

**State of California
Office of Administrative Law**

In re:
Department of Managed Health Care

Regulatory Action:

Title 28, California Code of Regulations

Adopt section: 1300.49

Amend sections:

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2018-0824-01

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

The Department of Managed Health Care (Department) proposed the adoption of section 1300.49 of title 28 of the California Code of Regulations that would define a health care service plan to include an entity that takes on global risk (both institutional and professional risk) for services provided to health plan subscribers and enrollees. Section 1300.49 would also define relevant terms concerning financial risk and set requirements for a restricted health plan license as well as standards for obtaining an exemption from health plan licensing requirements.

DECISION

On August 24, 2018, the Department submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On October 8, 2018, OAL notified the Department of the disapproval of this regulatory action. The reason for the disapproval was failure to comply with the “clarity” standard of Government Code section 11349.1. The Department also failed to follow all required procedures under the California Administrative Procedure Act. This Decision of Disapproval of Regulatory Action explains the reasons for OAL’s action.

DISCUSSION

Regulations adopted by the Department must generally be adopted pursuant to the rulemaking provisions of the California Administrative Procedure Act (APA), chapter 3.5 of part 1 of division 3 of title 2 of the Government Code (secs. 11340-11361). Pursuant to section 11346 of the Government Code, any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA.

No exemption or exclusion applies to the present regulatory action under review. Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed by OAL for compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

I. CLARITY

OAL must review regulations for compliance with the “clarity” standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines “clarity” as meaning “...written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The “clarity” standard is further defined in section 16 of title 1 of the California Code of Regulations (CCR), OAL’s regulation on “clarity,” which provides the following:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

- (a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:
 - (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
 - (3) the regulation uses terms which do not have meanings generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) the regulation presents information in a format that is not readily understandable by persons “directly affected;” or
 - (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.
- (b) Persons shall be presumed to be “directly affected” if they:
 - (1) are legally required to comply with the regulation; or
 - (2) are legally required to enforce the regulation; or
 - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or

- (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

As discussed below, proposed section 1300.49 fails to comply with the clarity standard of the APA.

Section 1300.49, subdivision (b), provides:

(b)(1) Any person who assumes global risk shall obtain a license to operate a health care service plan pursuant to section 1349 of the Health and Safety Code.

(2) Pursuant to section 1343 of the Health and Safety Code, the Director may grant an exemption from this section to any person upon review and a finding that the action is in the public interest and not detrimental to the protection of subscribers, enrollees or persons regulated under the Knox-Keene Act, including, but not limited to, consideration of the following information:

(A) Exhibit GG, Financial Viability, and Exhibit HH, Projected Financial Viability, of the application for licensure, pursuant to rule 1300.51 of this title. The Exhibits shall include current financial statements and projected changes that have or are expected to occur upon the assumption of global risk. A person that currently files audited financial statements with the Department may request an exemption from filing Exhibit GG;

(B) The total percentage of annualized income of institutional risk the person will assume and how it will be assumed;

(C) The contract(s) for the assumption of global risk;

(D) The estimated number of subscribers and enrollees for whom the person will provide health care services;

(E) The geographic service area(s) under the global risk arrangement(s) in which the person intends to operate; and

(F) Information on how the public interest or protection of the public, subscribers, enrollees, or persons subject to this chapter will be impacted if the person takes on global risk.

The regulated public would have difficulty utilizing this exemption from licensure requirements found in subdivision (b)(2) due to an absence of procedures as to how to apply for this exemption. Additionally, the regulation indicates an exemption may be granted if it is in the “...public interest and not detrimental to the protection of subscribers, enrollees or person regulated...”; however, this language is subject to more than one interpretation. The regulated public would not easily understand what would be in the public interest and not detrimental. There is *some* guidance on this subject in the Initial Statement of Reasons which states, “...the ability to apply for an exemption will allow entities that accept only a small portion of global risk, have only a minor market share, and/or operate in well served areas and are, therefore, less likely to disrupt the market and access to health care services in the event of a failure, to obtain

an exemption from the licensure requirement.” These standards, however, are not found in regulation and the relevant terms like “minor market share,” “small portion of global risk,” and “well served areas,” are not defined. Therefore, it is unclear how Department approval of an exemption is obtained. What criteria will the Department use in determining approval of an exemption? Further, proposed subdivision (b)(2) states that the Director may grant an exemption and the permissible use of “may” in subdivision (b)(2) makes it unclear when approval will be given and based upon what criteria. These clarity issues make it so that “the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning.” (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1). Additionally, the regulations are not “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” (Gov. Code, sec. 11349, subd. (c).)

II. INCORRECT PROCEDURE

Incorrect Form STD. 399

Government Code section 11347.3, subdivision (b)(5), requires that the rulemaking record contain the estimate, together with the supporting data and calculations, required by Government Code section 11346.5, subdivision (a)(6). Section 11346.5, subdivision (a) (6), requires, in part, the estimate of the cost or savings to any local agency. This paragraph further defines “cost or savings” as “additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.” Government Code section 11357 requires that the Department of Finance (Finance) adopt instructions for inclusion in the State Administrative Manual (SAM) prescribing the methods that any agency shall use in making the estimate required by section 11346.5, subdivision (a)(6).

For purposes of reporting this estimate and other information, Finance has developed, and requires regulatory agencies to use, the STD. 399 “Economic and Fiscal Impact Statement.” (SAM Chapter 6600, commencing with section 6601.)

SAM section 6615 establishes when financial estimates contained in STD. 399 require the concurrence of Finance. Section 6615 provides in part:

6615 ESTIMATES WHICH REQUIRE DEPARTMENT OF FINANCE ACTION

(Revised and renumbered from 6660 on 03/09)

Subdivision (c) of Government Code Section 11357 specifically authorizes [Finance] to “...review any estimate...for content including, but not limited to, the data and assumptions used in its preparation.”

A state agency is not required in all instances to obtain the concurrence of [Finance] in its estimate of the fiscal impact of its proposed regulation on governmental agencies. Such concurrence is required when the adoption, amendment, or repeal of a regulation

results in local agency costs or savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

- | | |
|----------------------------------|-------------------|
| A.1-Reimbursable Local Costs | B.1-State Costs |
| A.2-Non-Reimbursable Local Costs | B.2-State Savings |
| A.3-Local Savings | B.4-Other |
| A.6-Other | |

In addition, [Finance's] approval is required for the inclusion in any such estimate of any statement to the effect that reimbursement of local costs will be requested in a subsequent Governor's Budget, Section A.1 (b) on the STD. 399....

In the rulemaking record, the Fiscal Impact Statement part of the STD. 399 indicates in section A. 5, regarding the Department's proposed regulatory action's "Fiscal Effect on State Government" that "No fiscal impact exists. This regulation does not affect any local entity or program." This conflicts with information found in the Addendum to the Initial Statement of Reasons which indicates the cost for local governments is "...estimated to be \$1,316,625." Therefore, instead of box A. 5 being checked, the Department should have checked one of the following boxes, A. 1, A. 2 or A. 6 all of which indicate costs to local government and require the STD. 399 to be signed by the Finance.

Pursuant to SAM section 6615, when a state agency indicates that its proposed regulatory action will result in an increase in costs, as the Addendum to the Initial Statement of Reasons indicates, then the STD. 399 is required to be submitted to Finance for review and a signature from Finance indicating concurrence by Finance before submitting the STD. 399 as part of the rulemaking record for OAL's review. This did not occur. There is no signature from Finance on the Department's STD. 399. Thus, the Department failed to follow required APA procedures. A review and signature from Finance must be obtained and indicated on the STD. 399 before resubmitting this action to OAL.

CONCLUSION

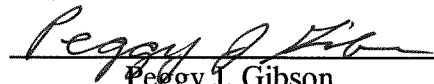
For the reasons set forth above, OAL disapproved this regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Department may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval. A copy of this Decision will be emailed to the Department on the date indicated below.

Any changes made to the regulation text to address the clarity issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11346.8 and section 44 of title 1 of the CCR, prior to resubmission of this regulatory action. The

Department must resolve all other issues raised in this disapproval decision before resubmitting this regulatory action.

If you have any questions, please contact me at (916) 323-6805.

Date: October 15, 2018


Peggy J. Gibson
Senior Attorney

For: Debra M. Cornez
Director

Original: Shelley Rouillard, Director
Copy: Jennifer Willis